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No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

October Term, 1988

NATIONAL ASSOCIATION OF COUNTIES, *et al.*,
Petitioners,

v.

JAMES A. BAKER, III, Secretary of the Treasury,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 23, 1988

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QUESTION PRESENTED*

May the Secretary of the Treasury withdraw $180 million that Congress appropriated for entitlement grants to local governments in the absence of a clear command from Congress directing him to do so?

*In addition to the parties listed in the caption, the following local governments and organizations of local governments appeared as plaintiffs-appellees below and are petitioners in this Court: National League of Cities; United States Conference of Mayors; City of New York; Kansas City, Missouri; City of Erie, Pennsylvania; Cuyahoga County, Ohio; Milwaukee County, Wisconsin; Riverside County, California; San Bernardino County, California; San Diego County, California; Shelby County, Tennessee; and Ventura County, California. In addition, Ashland County, Wisconsin, and Shelby County, Kentucky, sought leave to intervene in the court of appeals, but their motion was denied on the ground that, in view of the court's disposition of the case, no purpose would be served by permitting their intervention. They are not petitioners in this Court.

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In The

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OCTOBER TERM, 1988

No. 88-

NATIONAL ASSOCIATION OF COUNTIES, *et al.*,
Petitioners,

v.

JAMES A. BAKER, III, Secretary of the Treasury,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Association of Counties, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 842 F.2d 369 (1988) and is reproduced as Appendix ("App.") A at pages 1a-26a. The judgment of the court of appeals is reproduced as Appendix B at page 27a. The Order denying petitioners' petition for rehearing is not reported and is reproduced as Appendix C at page 29a. The Order and Memorandum Opinion of the district court is reported at 669 F. Supp. 518 (D.D.C. 1987) and is reproduced as Appendix D at pages 30a-41a.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1988. On May 26, 1988, the court of appeals denied petitioners' timely petition for rehearing. By Order dated August 10, 1988, Chief Justice Rehnquist extended the time for filing this petition to and including September 24, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Revenue Sharing Act, the Gramm-Rudman-Hollings Act, and the Consolidated Omnibus Budget Reconciliation Act of 1985 are reproduced as Appendix E, App. 44a-48a.

STATEMENT OF THE CASE

Petitioners in this action were, and had been since its inception in 1972, beneficiaries or representatives of beneficiaries of the federal revenue sharing program. This case stems from the confluence of two unrelated events: the phase-out of the revenue sharing program, which was implemented through the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 82, 327, § 14001 (1986) ("COBRA"), and Congress' passage of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037 (1985)("Gramm-Rudman-Hollings"). As a result of Gramm-Rudman-Hollings, nearly $180 million Congress appropriated for 1986 revenue sharing grants to local governments and placed in a Trust Fund were sequestered for all of fiscal year ("FY") 1986. Petitioners do not object to the refusal of the respondent Secretary of the Treasury to disburse the sequestered $180 million during FY 1986. Rather, this action focuses on the Secretary's refusal to release those funds

at the outset of FY 1987, when the sequestration order lapsed, despite the lack of a clear authorization from Congress to do so. In order to understand the grounds for this petition, it is necessary first to review the relevant statutes and then briefly recount the history of this litigation.

1. *Statutory Framework.*

Congress enacted the revenue sharing program in 1972 to ease the financial hardships facing many local governments by providing them unrestricted grants of federal funds. 31 U.S.C. §§ 6701 *et seq.* (commonly known as the "Revenue Sharing Act"). The statutory scheme for distributing funds was straightforward. The Act created an "entitlement" program, and established a Trust Fund administered by the Secretary of the Treasury. *Id.* § 6703(a). Appropriations made by Congress are placed in the Trust Fund, *id.*, and these monies may be used solely to pay local government grants for each "entitlement period." *Id.* § 6702. "Entitlement periods" are defined as the one-year period beginning on October 1 and running through the following September 30, which tracks the federal government's fiscal year. *Id.* § 6701(a)(1).

The Act sets forth the formula to be applied in determining the size of each grant, which takes into account a wide range of factors, including the population, the relative affluence, and the effort each government makes to raise its own revenues. 31 U.S.C. §§ 6708-10. Thus, the Act assigns the Secretary the essentially mechanical task of applying the statutory formula to divide the funds appropriated for that entitlement period among the eligible local governments. *Id.* The Act even regulates the timing of the payments, and, in many instances, directs the Secretary to make payments for an entitlement period well after that period has ended. *Id.* §§ 6702(b), (c) & (d). To give the Secretary the flexibility to make payments

without regard to fiscal year limitations, section 6703(a)(2) provides that "[a]mounts in the Trust Fund — remain available until expended." Under settled principles of budget law, this provision means that these funds are "no year" money: they can be used without fiscal year restraint. This empowers the Secretary to make payment at any time, thereby ensuring that all of the funds will be disbursed to the local governments. *See, e.g.*, H.R. Rep. No. 92-1018, 92d Cong., 2d Sess. 32-33 (1972). On November 25, 1985, President Reagan signed a bill appropriating $4,185,000,000 to the Revenue Sharing Trust Fund for the entitlement period coinciding with FY 1986. Pub. L. 99-160, 99 Stat. 924.

On December 12, 1985, the President signed Gramm-Rudman-Hollings into law. Pub. L. 99-177, 99 Stat. 1037, *codified at* 2 U.S.C. §§ 901 *et seq.* Gramm-Rudman-Hollings established procedures for the year-by-year "sequestration" of budget authority in an effort to reduce the annual national deficit and ultimately to balance the federal budget. While Gramm-Rudman-Hollings provided for the permanent cancellation of budget authority for most sequestered funds, it treated trust funds, such as the one for revenue sharing, differently. Thus, under the Act, appropriations *into* trust funds were exempt from sequestration. 2 U.S.C. § 905(g)(2). On the other hand, monies already appropriated and in the Trust Fund were subject to sequestration. However, another provision of the Act ensured that monies sequestered in trust and other special funds were not "permanently cancelled" or reduced, but rather were to "remain in such funds and be available in accordance with and to the extent permitted by law . . .." *Id.* § 906(a)(2).

On February 1, 1986, an order was issued under Gramm-Rudman-Hollings sequestering 4.3 percent of the budget authority in the Trust Fund, which is the $179,955,000 at issue

in this case. *See* S. Doc. No. 99-24, 99th Cong., 2d Sess. 798 (1986). On July 7, 1986, this Court, in *Bowsher v. Synar*, 478 U.S. 714, struck down the mandatory sequestration provisions of Gramm-Rudman-Hollings on separation of powers grounds. In response, Congress passed House Joint Resolution 672, Pub. L. 99-366, 100 Stat. 773 (July 31, 1986), which did no more than ratify the earlier sequestration order. Thus, the Trust Funds at issue remained sequestered until October 1, 1986, when the sequestration order expired.

Meanwhile, in 1983, Congress had reauthorized the revenue sharing program for two years, *i.e.*, through the end of fiscal year 1986. Then, in November and December 1985, just as Congress was debating Gramm-Rudman-Hollings, Congress finally decided not to extend the revenue sharing program any longer. That decision was enacted into law the following April as part of COBRA. Pub. L. 99-272, 100 Stat. 327, § 14001 *et seq.* (1986). COBRA did not, however, mandate the abrupt end of the program, nor did it make any changes in the status of any Trust Funds previously appropriated for revenue sharing, including those then subject to sequestration under Gramm-Rudman-Hollings. Rather, it provided for the program's orderly termination and made certain that the local government recipients received their complete 1986 entitlement grants. Thus, COBRA expressly provides that the Trust Fund "shall remain in existence until all entitlement payments that are required to be made under the Revenue Sharing Act are made in accordance with the terms of such Act," and that "[n]othing in this section shall be construed to prevent the payment of any allocation for the entitlement period ending September 30, 1986." *Id.* §§ 14001(a)(2) & 14001(e)(3). Moreover, COBRA directs that monies in the Trust Fund revert to the United States Treasury only "after all of such entitlement payments are completely made." *Id.* § 14001 (a)(2). Despite the provisions of Gramm-Rudman-Hollings

preserving the $180 million, and the provisions of COBRA giving the Secretary the authority to disburse the funds, on January 31, 1987, the Secretary transferred the previously sequestered $180 million from the Trust Fund to the General Fund of the Treasury, thereby depriving the local government beneficiaries of a portion of their grants for the 1986 entitlement period.

2. Proceedings Below.

Petitioners filed this action on February 19, 1987, in the United States District Court for the District of Columbia, asserting jurisdiction under 28 U.S.C. § 1331. Petitioners sought an order compelling the Secretary to restore the $180 million to the Trust Fund and to make the remaining 1986 revenue sharing grant payments. The complaint alleged that, in accordance with Gramm-Rudman-Hollings, the $180 million "remain[ed]" in the Trust Fund during sequestration, and that, at the expiration of the sequestration order at midnight on September 30, 1986, it became available for distribution. *See* 2 U.S.C. § 906(a)(2). Petitioners further asserted that no statutory authorization existed for the Secretary's transfer of the $180 million out of the Trust Fund, and hence the transfer was unlawful.

On cross-motions for summary judgment, the district court granted judgment to petitioners. App. 30a. The district court saw the issue as "a relatively narrow one of statutory interpretation: was the Secretary of the Treasury acting within his statutory authority in refusing to disburse and instead returning to the General Fund the $180 million in Trust Funds of the 1986 entitlement payments to local governments under the revenue sharing program that was sequestered under Gramm-Rudman?" App. 33a. Turning to the relevant statutes, the court observed that Gramm-Rudman-Hollings did not

cancel the $180 million, but rather "froze" it for one fiscal year. App. 34a. The court then examined the Revenue Sharing Act, and found that it supported the "conclusion that the sequestered funds would be resuscitated after fiscal year 1986." App. 35a. The court noted that, under the Revenue Sharing Act, Trust Fund monies "remain available until expended," and that "Congress clearly entrusted to the Secretary the responsibility to ensure that local governments received their entitlement grants without regard to the technical restraints that might be imposed by fiscal years." App. 36a The court also concluded that, because revenue sharing is an entitlement program, the "federal government can only deny payment of the full amount of entitlement grants if the recipient does not comply with applicable standards . . . or where there has been an intervening change in the law *expressly* authorizing nonpayment." App. 37a (emphasis added, citations omitted).

Having articulated the relevant legal standard, the court considered the Secretary's argument that the phase-out of the revenue sharing program "deprived him of authority to disburse the sequestered funds beyond fiscal year 1986." App. 37a. The court found, however, that a "close examination of COBRA . . . leads to the opposite conclusion and bolsters plaintiffs' argument that Congress deliberately sought to protect the Trust Fund from at least some of its recent budget-cutting enthusiasm." App. 37a. In so ruling, the court relied in part on COBRA's requirement that the Trust Fund remain in existence until all entitlement payments are "completely made." App. 33a. Accordingly, the court held that, "[g]iven such a clear expression of congressional intent in the Revenue Sharing Act, Gramm-Rudman, and COBRA, it is evident that defendant has improperly refused to disburse the sequestered funds and cannot justify his actions in transferring the funds to the general fund." App. 38a.

The court of appeals reversed. The court did not point to any language in either Gramm-Rudman-Hollings or COBRA that expressly authorized the Secretary's action; indeed, the court found the statutory provisions ambiguous. App. 17a. Nor did the court take issue with the legal standard employed by the district court, which placed the burden on the Secretary to demonstrate that Congress expressly authorized the cancellation of the $180 million. Nonetheless, the court held that sequestration under Gramm-Rudman-Hollings "resulted in a reduction in the FY 86 appropriation to the Trust Fund." App. 21a. In so ruling, it did not cite, much less discuss, the savings provision of Gramm-Rudman-Hollings, which appears to dictate a contrary result. 2 U.S.C. § 905(g)(2). Rather, the court found that the $180 million was "carried forward" as 1987 budget resources, but it concluded that the Secretary could not disburse the funds in any event because the "Trust Fund was terminated by COBRA at the close of FY 86." App. 19a. In reaching this conclusion, the court cited no language in COBRA as support, and did not explain why the language in both COBRA and the Revenue Sharing Act relied on by the district court did not require the opposite result. Thus, in the court of appeals' view, since COBRA terminated the revenue sharing program at the end of FY 1986, the Secretary had no authorization, applicable during FY 1987, to pay out these funds, and hence the transfer of the funds to the General Fund of the Treasury was permissible.[1]

[1]The court also rejected the Secretary's contention that petitioners' suit was one for money damages, and thus should have been brought in the Claims Court under the Tucker Act. App. 15a. The court's ruling on this issue is in line with the subsequent decision of this Court in *Bowen v. Massachusetts*, 108 S. Ct. 2722 (1988).

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because the decision below is directly at odds with the prior decisions of this Court dealing with the standards to be used in determining when the beneficiary of an entitlement program may be denied payment of a grant. This Court has held that the government may deny full payment of an entitlement where — and only where — it can point to an intervening change in the law expressly authorizing nonpayment. This longstanding rule is a variant on the equally well-settled doctrine that repeals by implication are strongly disfavored. Here, because there is no statutory command directing the Secretary to deny payment of $180 million in revenue sharing funds, the ruling below casts a cloud over settled entitlement law. Moreover, if uncorrected, the ruling will have a profoundly destabilizing effect on all entitlement programs — which are structured as "entitlements" in order to guarantee the beneficiary a stable and predictable funding source — because it allows the Executive Branch to deny payment on the basis of gaps or ambiguities in legislation relating to the program. Accordingly, the question presented is substantial and warrants review.

THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Review in this case is required because the court of appeals, without ever addressing the legal standard governing when the federal government may deny an entitlement beneficiary the payment of a grant, sustained the Secretary's action even though it acknowledged that the statutes on which the Secretary relied were ambiguous. However, it has long been settled that the Executive Branch has only limited authority to interfere with the expenditure of funds appropriated by Congress. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.)

534 (1838); *Train v. City of New York*, 420 U.S. 35, 44-48 (1975); *City of New Haven v. United States of America*, 809 F.2d 900 (D.C. Cir. 1987); *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). As a general rule, officials of the Executive Branch may refuse to expend appropriated funds only where Congress has expressly conferred that power — in the provisions establishing a given program, in the relevant spending statutes, or in some other provision of law. *Id.*

These longstanding principles have special force where an entitlement program is involved, as is the case here. Congress does not create entitlement programs lightly; it does so only when it intends to confer "a legal right" or "property interest" which "creates a justiciable cause of action even without a specific statutory authorization for review." *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 136 (1946); *see also The Congressional Budget Process: A General Explanation*, House Committee on the Budget, at 171 (1986)(Comm. Print); *United States v. Larionoff*, 431 U.S. 864, 878-81 (1977).

Applying these principles, this Court has warned that the federal government may deny payment of the full amount of an entitlement grant to a beneficiary *only* if there has been an intervening change in the law that expressly authorizes nonpayment. *See, e.g., United States v. Larionoff, supra*, 431 U.S. at 879; *National Association of Regional Councils v. Costle*, 564 F.2d 583, 586-90 (D.C. Cir. 1977). This doctrine is a direct outgrowth of the time-honored principle of statutory construction that repeals by implication are disfavored, and that Congress' intention to repeal its own acts must be "clear and manifest." *United States v. Borden*, 308 U.S. 188, 198 (1939); *accord, United States v. Will*, 449 U.S. 200, 221-22 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *see also Demby v. Schweiker*, 671 F.2d 507, 511 (D.C. Cir.

1981); *see also id.* at 513 (Wright, J., concurring) & *id.* at 514 n.1 (Wald, J., dissenting).

Indeed, this Court suggested in *Larionoff* that "serious constitutional questions would be presented" if Congress sought to deny a beneficiary a vested entitlement — the very result sanctioned by the court below. 431 U.S. at 879. Other courts have similarly implied that once a grant-holder's property interest vests, as did the local government's interest in the grant funds here once Congress appropriated funds for FY 1986, it cannot be abrogated without running afoul of the Fifth Amendment. *See, e.g., New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *State Highway Commission v. Volpe*, 479 F.2d 1099, 1109-10 & n.15 (8th Cir. 1973). Indeed, in petitioners' view, it was to avoid any constitutional confrontation that Congress accorded special treatment to entitlement programs in Gramm-Rudman-Hollings, insulating appropriations into trust and special funds from reduction in 2 U.S.C. § 905(g), and exempting budget authority sequestered in trust or special funds from permanent cancellation in § 906(a). As is evident, the presence of "serious constitutional questions" whenever an entitlement beneficiary is threatened with nonpayment underscores the need to retain the stringent legal standard established in *Larionoff*, and highlights the serious flaws in the approach followed by the court of appeals in this case.

The ruling below is also in conflict with the longstanding principle that the Executive Branch has no discretionary control over the payment of appropriated funds, absent an express delegation of such power by Congress. *See Train v. City of New York*, 420 U.S. 35 (1975). In this post-*Chevron* era of substantial deference to the Executive Branch in matters of statutory construction, under the ruling below any time a dispute over funding arises, the beneficiaries will be able to

prevail *only* where Congress' intent is "unambiguously expressed"; whenever there is an ambiguity, the Executive Branch's view will govern. *Chevron*, *supra*, 467 U.S. at 842-43. This stands existing appropriations law on its head.

There are sound reasons why this Court, at least since its decision in 1838 in *Kendall v. United States ex rel. Stokes*, *supra*, has refused to accord discretion to the Executive Branch in the spending area in the absence of an express congressional command. Most importantly, as was true here, there is often a conflict between Congress and the Executive Branch over the wisdom of a particular program. As *Train v. City of New York* exemplifies, to allow the Executive Branch any discretionary control over spending not expressly conferred by Congress gives the Executive Branch the ability to hamper the implementation of programs Congress supports. *See also State Highway Comm'n v. Volpe*, *supra*. Moreover, while the principles of deference to agency expertise articulated by the Court in *Chevron* have little applicability to funding statutes, the court of appeals gave weight to the Secretary's interpretation of Gramm-Rudman-Hollings even though respondent conceded in the district court that "the Secretary of the Treasury does not have a role in interpreting that Act [Gramm-Rudman-Hollings] nor in issuing a sequestration order." Defendant's Memorandum in Support of Motion to Dismiss, or in the Alternative, Cross Motion for Summary Judgment, filed on April 13, 1987, at 16 n.18.

The court below departed from these established precedents — which were the main focus of petitioners' brief — without so much as citing them. Instead, the court approached this case as if it presented run-of-the-mill questions of statutory construction, and, citing *Chevron*, adopted the interpretation proffered by the Secretary. The court never looked to see whether the Secretary could meet the far heavier burden

placed on him under cases such as *Larionoff* and *Train*. Nor did the Secretary attempt to shoulder the burden imposed by this line of authority. To the contrary, his brief in the court of appeals acknowledged that "none of . . . [the relevant statutes] addresses the precise issue here," Sec. Br. at 12, and the court of appeals agreed that nothing in the statutes indicated that Congress had spoken directly to this issue.

In fact, the statutes permit no other conclusion. Nothing in Gramm-Rudman-Hollings expressly withdrew or cancelled these funds; on the contrary, the only relevant provisions of that Act embody a strong congressional intent to preserve them. *See* 2 U.S.C. §§ 905(g)(2) & 906(a)(2). Similarly, in COBRA, Congress repeatedly evinced an intention to ensure that all grant payments were "completely made" before the Trust Fund was closed out. And in both COBRA and the Revenue Sharing Act, Congress expressly provided that monies in the Trust Fund could be disbursed without fiscal year limitation, *see* COBRA, § 14001(a)(2) and 31 U.S.C. § 6703(a)(2), which also shows Congress' intention to ensure that these funds were fully paid out to local governments.

In the face of these statutes, the court below did what the prior decisions of this Court forbade it from doing: it upheld the denial of an entitlement payment — and the *de facto* repeal of the appropriations legislation that placed the $180 million in the Trust Fund — "in the absence of a clear expression of congressional intent." *Larionoff*, 431 U.S. at 879. Because this ruling is in stark conflict with this Court's prior decisions, this Court should grant review.

The need for review is heightened in this case, since, if uncorrected, the ruling below will jeopardize the effective implementation of all entitlement programs. Congress creates entitlement programs for one principal reason: to assure the

program's beneficiaries a stable and predictable source of funding. This is especially important for local governments who need to count on specific levels of federal assistance in engaging in long-term fiscal planning, and must rely on a predictable stream of federal funds to undertake certain types of major capital improvement projects — such as mass transit improvement, community development, and road construction. Without stable funding, the value of these programs to local governments is substantially diminished.

The ruling below will have a profoundly destablizing effect on these programs. Until the court of appeals' ruling, it was settled that the federal government — not the grantee — bore the risk of ambiguous or imprecise legislation. *Larionoff, supra*; *cf. Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *Bennett v. New Jersey*, 470 U.S. 632, 638-41 (1985). Thus, once Congress appropriated funds for an entitlement program, the beneficiary was guaranteed its full grant, unless Congress subsequently acted expressly to deny payment. The risk of subsequent congressional action was slight, precisely because of the "serious constitutional problems" this Court identified in *Larionoff*. Under the ruling below, however, the risk of ambiguity or legislative imprecision is shifted 180 degrees to fall squarely on the shoulders of the beneficiary, who must prove that Congress intended that full payment be made.

It is hard to overstate the magnitude of this problem. Legislative precision is an elusive and rarely attained goal, particularly in the area of funding and administering grant programs. Disputes have routinely arisen in the past over funding, and there is every reason to expect that disputes will continue to arise. *Bennett v. New Jersey, supra*; *City of New Haven v. United States of America*, 809 F.2d 900 (D.C. 1987); *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977); *Con-*

necticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168 (8th Cir. 1974); *Kennedy v. Mathews*, 413 F. Supp. 1240 (D.D.C. 1976).[2] As a result, the fact that Congress designates a program as an "entitlement" — a designation that used to *guarantee* payment — means much less in light of the decision below. Under this new standard, an entitlement beneficiary is *likely* to be paid, unless of course there is either an ambiguity or loophole in the appropriations legislation or subsequent legislation enacted by Congress that could plausibly be construed as conferring discretion on the Executive Branch to deny payment. That is the impact of the ruling below, and it threatens the utility of all entitlement programs, especially where local governments are concerned.

[2]If anything, the presence of Gramm-Rudman-Hollings will accelerate this trend, since it calls for Congress to continue to reduce the deficit through percentage reductions in the annual budget. The use of cross-cutting statutes such as Gramm-Rudman-Hollings to alter the appropriation levels in specific programs will inevitably spawn disputes over the applicability of the mandated reductions to particular programs.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1988

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5287

NATIONAL ASSOCIATION OF COUNTIES, et al.

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 87-00414)

Argued November 24, 1987

Decided March 11, 1988

Barbara C. Biddle, Attorney, Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, Department of Justice, *Joseph E. diGenova*, United States Attorney, and *John F. Cordes*, Attorney, Department of Justice were on the brief for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

David C. Vladeck, with whom *Alan B. Morrison* and *Thomas H. Stanton* were on the brief for appellees.

Before: WALD, *Chief Judge*, SENTELLE, *Circuit Judge*, and GIBSON,* *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* GIBSON.

GIBSON, *Senior Circuit Judge*: James A. Baker, III, Secretary of the Treasury (Secretary), appeals an order of the district court [1] which requires the Secretary to disburse to the individual local governments entitled to payment under the Revenue Sharing Program approximately 180 million dollars of Revenue Sharing Trust Fund monies which were sequestered pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985.[2] (Gramm-Rudman-Hollings). The plaintiffs, a number of individual local governments and three associations representing local governments, challenged the transfer of these funds to the General Fund of the Treasury and sought an injunction requiring the Secretary to release the funds to the local governments. The district court held the transfer of funds unlawful and ordered the Secretary to disburse the funds. The district court reasoned that although the Secretary lawfully sequestered the funds for Fiscal Year (FY) 1986 pursuant to Gramm-Rudman-Hollings, the funds should be distributed in FY 1987 in compliance with Gramm-Rudman-Hollings § 256 (a)(2), codified at 2 U.S.C. § 906 (a)(2) (Supp. IV 1986), which deals with the effect of the sequestration order.

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The district court's Memorandum Opinion and Order and Judgment is published at 669 F. Supp. 518 (D. D.C. 1987).

[2] Pub. L. 99-177, 99 Stat. 1037 (Dec. 12, 1985), codified at 2 U.S.C. § 901 *et seq.* (Supp. IV 1986).

The Secretary raises two arguments on appeal. First, the Secretary argues that the district court lacked subject matter jurisdiction over this case because the claims raised by the local governments are Tucker Act claims which may only be brought in the Claims Court. Second, the Secretary argues that the district court erred in holding that the Revenue Sharing Trust Funds sequestered under Gramm-Rudman-Hollings were required to be disbursed to the local governments. While we disagree with the Secretary's argument that the district court lacked subject matter jurisdiction, we agree with the Secretary that the district court erred in requiring the sequestered Revenue Sharing Trust Funds to be disbursed to the local governments. Accordingly, we reverse.

I. BACKGROUND

Congress enacted the Revenue Sharing Act, 31 U.S.C. § 6701 (1982), to provide noncategorical financial assistance to local governmental units in the form of annual entitlements. Pursuant to the Act payments to the local governments are made through the State and Local Government Fiscal Assistance Trust Fund, of which the Secretary of the Treasury is personally the trustee. *Id.* § 6703 (a).

Congress appropriated $4,566,700,000 to the Trust Fund for the entitlement period coinciding with FY 1986; however, this amount was subsequently reduced by an Act of Congress to $4,185,000,000. Pub. L. 99-160, 99 Stat. 909, 924 (Nov. 25, 1985). On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, codified at 2 U.S.C. § 901 *et seq.* (Supp. IV 1986), popularly known as "Gramm-Rudman-Hollings." The purpose of the Gramm-Rudman-Hollings legislation is to eliminate the federal budget deficit by 1991.

On February 1, 1986, the President issued an order pursuant to Gramm-Rudman-Hollings § 252 (a) (1),

codified at 2 U.S.C. § 902(a)(1), which sequestered, *inter alia*, $179,955,000, or 4.3%, of the monies appropriated to the State and Local Government Fiscal Assistance Trust Fund. 3 C.F.R. 254 (1987). In *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), the Supreme Court invalidated the President's sequestration order. However, Congress passed and the President signed legislation ratifying the President's February 1st order. P.L. 99-366, 100 Stat. 773 (July 31, 1986).

In April 1986 the President signed the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 82, 327, § 14001 (April 7, 1986) (COBRA). COBRA terminated the Revenue Sharing Program and provided for the winding down of the program at the close of the 1986 entitlement period.

In January and February 1987 representatives of the local governments requested the Secretary to release the Trust Fund monies sequestered under Gramm-Rudman-Hollings. The Secretary informed them that the funds would not be released and had been transferred to the General Fund of the Treasury.

The local governments filed an action for declaratory and injunctive relief in the district court. Cross motions for summary judgment were filed and the district court granted the local governments' motion.

II. Discussion

A. Jurisdiction

The Secretary argues that the district court lacked subject matter jurisdiction over this case because the claim raised by the local governments is a claim for "money damages" and thus may only be brought in the Claims Court pursuant to the Tucker Act. We disagree.

We begin this analysis by determining whether any other federal statute provides a waiver of sovereign im-

munity for the type of relief sought by the local governments. The local governments argue that the Administrative Procedure Act provides such a waiver and that 28 U.S.C. § 1331 (1982) provides subject matter jurisdiction for the district court to decide this substantial federal question. Section 702 of the Administrative Procedure Act provides a waiver of sovereign immunity for actions "stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority" provided, however, that the relief sought is "relief other than money damages." 5 U.S.C. § 702 (Supp. IV 1986). Thus we must first determine whether the relief the local governments seek is "money damages" within the meaning of the Administrative Procedure Act.

The Secretary argues that the relief sought by the local governments, although framed in equitable terms, is tantamount to a money judgment and thus the APA's waiver of sovereign immunity is unavailable to the local governments. This court, however, rejected the Secretary's analysis in *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). In *Maryland*, this court concluded that the term "money damages" as used in the APA refers to compensatory relief or damages "given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 1446 (emphasis in original) (quoting D. Dobbs, *Handbook on the Law of Remedies* 135 (1973)). We do not believe that it is necessary to repeat all of what was said in *Maryland*, the principal precedent on which we rely.

In the present case the relief sought by the local governments is not money damages as that term is used in the APA. The local governments are seeking funds to which a statute allegedly entitles them rather than money

in compensation for the losses they may have suffered by virtue of the withholding of those funds. Therefore, the relief sought by the local governments is specific relief and not classical money damages. If the relief the local governments sought was compensation for damages resulting from the Secretary's actions and not the disbursal of the withheld funds, then the APA would not have provided a waiver of sovereign immunity.

We note that several other circuits have followed a different approach. For example the Tenth Circuit explicitly rejected the approach followed in *Maryland* stating "a plaintiff may not transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money." *State of New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984), *cert denied*, 471 U.S. 1065 (1985); *see also Commonwealth of Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778, 783 (1st Cir. 1987) ("We read the words 'money damages' to mean any monetary relief, whether it is in the nature of damages or in the nature of specific relief."); *cf. Chula Vista City School Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987) ("It is well settled that where the prime effort of the plaintiff is to obtain money from the Government, the exclusive jurisdiction of the Claims Court cannot be avoided by drafting a complaint which appears to seek only injunctive, mandatory, or declaratory relief against the Government.") (footnote omitted), *cert. denied*, 108 S. Ct. 774 (1988); *Amoco Production Co. v. Hodel*, 815 F.2d 352, 361 (5th Cir. 1987) ("in the 'murky' area of Tucker Act jurisprudence, . . . one of the few clearly established principles is that the substance of the pleadings must prevail over their form."), *pet. for cert. filed*, 56 U.S.L.W. 3184 (Sept. 22, 1987); *State of Minnesota by Noot v. Heckler*, 718 F.2d 852, 858-59 (8th Cir. 1983). *See also Gibson v. Block*, 619 F. Supp. 1572, 1575 (N.D.

Ind. 1985) (surveying the "different formulae [that] exist to test the essence of the plaintiff's claim.").

We believe that the relief sought by the local governments is not a claim for money damages within the meaning of the APA, notwithstanding the fact that the claim, if successful, may require the payment of money by the federal government. Therefore since the APA provides a waiver of sovereign immunity for the local government's claims the district court properly exercised its general federal question jurisdiction over these claims. We will now consider the Tucker Act's applicability to the local government's claims.

The Tucker Act provides a waiver of sovereign immunity for two classes of claims. Stated briefly the first class includes claims based on contract and the second class involves claims founded on the Constitution, any Act of Congress, or regulation of the Executive.

The Tucker Act confers exclusive jurisdiction on the Claims Court for all cases involving claims against the United States for money damages exceeding $10,000 "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . ." 28 U.S.C. §§ 1346 (a)(2), 1491 (a)(1) (1982).[3]

The Secretary does not argue that this case falls within the "contracts" branch of Tucker Act jurisdiction. Rather, the Secretary argues that this case falls within the Claims Court jurisdiction over claims "against

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[3] Under the "Little Tucker Act", the district courts and the Claims Court have concurrent jurisdiction for claims which do not exceed $10,000. 28 U.S.C. § 1346 (a)(2) (1982). The "Big Tucker Act" however vests exclusive jurisdiction in the Claims Court for all Tucker Act Claims that exceed $10,000. 28 U.S.C. § 1491 (a)(1) (1982).

the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." 28 U.S.C. § 1491 (a)(1).

> The classic explication of these words is found in *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 178 Ct. Cl. 599 (1967):
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> 'But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. . . . In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. *Id.* 372 F.2d at 1007.'

Commonwealth of Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d at 786.

However, it is clear that while providing a waiver of sovereign immunity, the Tucker Act does not provide a substantive right to recover. The claimant invoking Tucker Act jurisdiction must establish a substantive right to recover money damages.

In *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Supreme Court explained the noncontractual basis of Tucker Act jurisdiction: "[T]he claimant must demonstrate that the source of substantive law he relies upon '"can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."'" *Id.* at 216-17 (quoting *United States v.*

Testan, 424 U.S. 392, 400 (1976) (quoting *Eastport Steamship Corp. v. United States*, 372 F.2d at 1009)).

Thus, in order for the Tucker Act to apply to this case it must be established that a federal statute mandates the compensation sought by the local governments.

The Secretary argues that the Revenue Sharing Act mandates compensation because the Revenue Sharing Trust Funds withheld by the Secretary were entitlements.[4] We disagree with the Secretary for two reasons. First, we do not believe that the Revenue Sharing Act can fairly be interpreted as mandating the compensation which the local governments seek. Second, we believe that the compensation mandating requirement refers to cases where "classical money damages" are sought by the plaintiff and not to cases such as the present case where the relief sought is only a disbursal of the money to which a statute allegedly entitles them.

The Revenue Sharing Act does not expressly mandate compensation. The Secretary cannot point to any specific language in the Revenue Sharing Act which commands "the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet." *Eastport Steamship Corp.*, 372 F.2d at 1008.

The only language appearing in the Revenue Sharing Act which arguably supports the Secretary's position is Section 6702 which provides:

> Each unit of general local government *is entitled to an amount* equal to any amount allocated to the

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[4] To the extent that dicta in *International Union v. Donovan*, 746 F.2d 855, 861 n.5 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985) suggests that, in all cases, the appropriate remedy for seeking funds under an entitlement program is under the Tucker Act, we disagree. Such determinations must be made only after considering the entitlement program and its authorizing legislation in order to determine whether the statutes can fairly be interpreted as mandating compensation.

> government under this chapter for each entitlement period. Each State government shall be paid an amount equal to any allocation made for each entitlement period.

31 U.S.C. § 6702 (1982) (emphasis added).

We do not believe that this language can be fairly interpreted as compensation mandating.

Because the Revenue Sharing Act does not expressly provide a cause of action in favor of the local governments, the only remaining question is whether an implied cause of action for money would lie in favor of the local governments.

While it is true that the Revenue Sharing Act creates substantive rights in favor of the local governments, it is also true that substantive rights standing alone do not imply a remedy for money damages under the Tucker Act. *United States v. Testan*, 424 U.S. at 401; *Mitchell II*, 463 U.S. at 236 (Powell, J., dissenting).

The Revenue Sharing Act contains no provision that expressly makes the United States liable for mismanagement of the Revenue Sharing Trust Funds. Nor is there any indication in the legislative history that Congress intended to provide the local governments with a substantive right to recover money damages due to mismanagement of the Revenue Sharing Trust Funds.

We are reluctant to interpret the Revenue Sharing Act as mandating compensation in the absence of clear Congressional intent, because to do so would result in an implied right of action in favor of Trust Fund recipients. *United States v. Testan*, 424 U.S. at 400 ("the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity."); *Maryland*, 763 F.2d at 1450 ("an implied cause of action for damages against the United States will not lightly be inferred.") (citing *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 739-40 (1982)). A substantive right to

recover is not to be implied in the absence of clear Congressional intent. We do not believe the Revenue Sharing Act or its legislative history reflects an intent by Congress to provide the local governments with a substantive right to recover damages due to the improper withholding of funds by the Secretary.

The Secretary argues that because the Revenue Sharing Act creates a Trust Fund with the Secretary as trustee the statute is similar to the statutes and regulations involved in *Mitchell II*, 463 U.S. 206. In *Mitchell II* the Supreme Court held that the existence of a trust relationship and fiduciary obligations between the United States and Indian allottees of land held in trust by the United States established that the statutes and regulations were compensation mandating.

While it is true that the Revenue Sharing Act establishes a Trust Fund and names the Secretary as the trustee, we believe the Act creates only a limited trust relationship similar to the trust discussed in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). In *Mitchell I* the Supreme Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States. In *Mitchell II* the Supreme Court discussed *Mitchell I* and placed great significance on the fact that the "trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof. . . ." *Mitchell II*, 463 U.S. at 217-18. We believe that the Revenue Sharing Act creates only a limited trust relationship similar to the trust created by the General Allotment Act under *Mitchell I*.

> It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to pre-

> vent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell I, 445 U.S. at 544 (footnote omitted).

It is clear that Congress created the State and Local Government Fiscal Assistance Trust Fund "[t]o insure that a constant source of funds [would] be available for the five year duration of the revenue sharing program." S. Rep. No. 1050, 92nd Cong., 2nd Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3874, 3892.

The creation of the Trust Fund also furthered Congress' intent that the Trust Funds would be available without fiscal year limitation and that the monies would only be used for payments to state and local governments. *Id.*

We do not think that when Congress created this Trust Fund and made the Secretary trustee Congress did so with the intent that the trustee would be subject to money damages for breaches of fiduciary duties. Rather, Congress created the Trust Fund in order to insure constant funding for the Revenue Sharing Programs. Indeed, there is no indication in the Revenue Sharing Act or its legislative history that the Secretary owes any common law fiduciary obligations to Trust Fund recipients. By creating the Trust Fund Congress was able to appropriate funds in advance, for the life of the program, thus enabling the local governments to budget their programs in advance. *Id.* at 3885. Thus, we do not believe that the fact that the Revenue Sharing Act created a Trust Fund and made the Secretary the trustee of this fund compels the conclusion that the Revenue Sharing Act is compensation mandating.

We note that there is a common thread running through the cases discussing Tucker Act jurisdiction based on federal compensation mandating law. These cases generally involve nonmonetary statutory rights which have been abridged and claimants seeking money

damages as compensation for the denial of their statutory rights. *Mitchell II*, 463 U.S. at 219 ("We begin by describing these sources of substantive law. We then examine whether they can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose."). The case at bar, however, is distinguishable on its facts. The Revenue Sharing Act creates monetary entitlements, or rights, and the local governments seek only to enforce those rights. They do not seek monetary compensation because their rights have been abridged. Thus, the local governments seek specific relief. There is a difference between monetary relief in the form of compensation on the one hand, and monetary relief in the form of specific relief, on the other.

Examples of federal law which may be fairly characterized as compensation mandating include, among others, the Fifth Amendment's prohibition on taking private property for public uses without just compensation, the Back Pay Act, 5 U.S.C. § 5596 (b)(1) (1982), and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (a) (1982).[5]

Finally, we note that our determination that the Revenue Sharing Act is not a compensation mandating statute supports our conclusion that the APA provides a waiver of sovereign immunity for the district court to exercise jurisdiction pursuant to 28 U.S.C. § 1331. If the APA were construed to preclude the local governments from invoking its waiver of sovereign immunity then the action of the Secretary would be immune from judicial review. Such a result, however, would be inconsistent with Supreme Court precedent holding that:

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[5] *See United States v. Causby*, 328 U.S. 256, 267 (1946) (Fifth Amendment); *Mitchell II*, 463 U.S. at 217 (Back Pay Act); *Amoco Production Co. v. Hodel*, 815 F.2d at 360 (5th Cir. 1987) (Outer Continental Shelf Lands Act).

> [I]n administrative cases where the organic statute is silent on the subject of judicial review '[t]he presumption that review is available, . . . coupled with the absence of any indication in the statute that the decision is committed wholly to the discretion of the agency or that review is otherwise precluded, . . . leads to the conclusion that the district court[] would have had jurisdiction under the general grant of jurisdiction over cases involving federal questions . . .'

Maryland, 763 F.2d at 1445 (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 n.3 (1983) (dictum)) (citations omitted).

As already noted, the Tucker Act only confers jurisdiction on the Claims Court for claims involving money. *Mitchell II*, 463 U.S. at 216-17. Thus, at first glance the Tucker Act waiver of sovereign immunity, which only applies to claims for money, and the APA § 702 waiver of sovereign immunity, which applies to claims "seeking relief other than money damages," would appear to be mutually exclusive.

The Secretary argues, however, that Tucker Act jurisdiction and § 702 jurisdiction overlap.

> [T]he presence of a valid Tucker Act claim in this case raises the issue left open in *Maryland*. *Maryland* recognized that there is a potential overlap between APA/1331 jurisdiction and Tucker Act jurisdiction, because a monetary claim that is other than a classic 'money damages' claim—and which therefore qualifies for APA purposes—can still be the type of money claim that is cognizable under the Tucker Act. The Court reserved the question of whether the Tucker Act or the APA would control where both were applicable.

Appellants brief at 38.

Regardless of the merits of the Secretary's argument we need not decide this question which was presented,

but not decided, in *Maryland*. Because we hold that the Revenue Sharing Act is not a compensation mandating statute there is no Tucker Act jurisdiction in this case that prevents the application of Section 702's waiver of sovereign immunity and thus there is no overlap between Section 702 and the Tucker Act.

B. *Merits*

The local governments challenge the Secretary's refusal to disburse approximately 180 million dollars of Revenue Sharing Trust Funds. The Secretary transferred the funds to the General Fund of the Treasury.

The Secretary's action was based on three interrelating statutes: the Revenue Sharing Act, COBRA, and Gramm-Rudman-Hollings. The Revenue Sharing Act established a financial assistance program for local governments authorized through FY 86 and COBRA terminated these programs at the end of the FY 86 entitlement period. Gramm-Rudman-Hollings required the sequestration of 4.3% of the funds appropriated to the Revenue Sharing Trust Fund for FY 86. The 180 million dollars at issue in this case represents the 4.3% sequestered under Gramm-Rudman-Hollings.

The issue before the court is whether the Secretary was within his statutory authority in refusing to disburse the Trust Fund monies sequestered pursuant to Gramm-Rudman-Hollings and returning these monies to the General Fund of the Treasury. In order to answer this question we must first determine the impact Congress intended the sequestration provisions of Gramm-Rudman-Hollings to have on the sequestered Trust Funds.[6]

We begin our analysis by looking at the plain language of the statute. *Consumer Product Safety Comm'n v.*

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[6] The local governments do not challenge the order sequestering the funds.

GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Gramm-Rudman-Hollings § 256(a)(2), codified at 2 U.S.C. § 906 (a)(2) provides, in pertinent part:

> Any amount of new budget authority, unobligated balances, obligated balances, new loan guarantee commitments, new direct loan obligations, spending authority . . ., or obligation limitations which is sequestered or reduced pursuant to an order issued under section 902 of this title is permanently cancelled, *with the exception of amounts sequestered in special or trust funds, which shall remain in such funds and be available in accordance with and to the extent permitted by law, including the provisions of this Act.*

2 U.S.C. § 906 (a)(2) (Supp. III 1985) (emphasis added).

Determining the Congressional intent of the underscored language goes far toward resolving the issue before the court.

The district court held that:

> The clear import of this language is that the $180 million of the Trust Fund that was sequestered was to remain "available" and be distributed according to the relevant authorizing statute and any subsequent legislation. In short, Gramm-Rudman froze $180 million of the Trust Fund for one fiscal year.

669 F. Supp. at 521.

While we agree with the district court that the Act provides that monies sequestered in Trust Funds were to remain available, we do not agree that the Act was intended to freeze or merely defer the payment of the funds for one fiscal year. We interpret this language of Gramm-Rudman-Hollings as a reduction in FY 86 budgetary resources, and as requiring the funds to remain available in the applicable Trust Fund as FY 87

budgetary resources.[7] Therefore, the funds can only be released if there is some independent source of legislation authorizing the Secretary to release the funds in FY 87. Since COBRA repealed the Revenue Sharing Act and its programs, the Secretary has no FY 87 authority to disburse the sequestered funds.

Although neither our interpretation of this language nor the district court's interpretation is compelled by the language of the statute on its face, we believe that construing this provision as a reduction of FY 86 budgetary resources is the only plausible interpretation in view of the Congressional intent in passing the legislation.

It is plain that the Congressional intent in enacting Gramm-Rudman-Hollings was to reduce the deficit. We think it is necessary to keep this Congressional objective in mind when interpreting the provisions of the legislation. Adoption of the local government's interpretation of this provision would not further Congressional objectives. Merely freezing the FY 86 entitlements and "resuscitating" them in FY 87 as FY 86 resources would not result in any meaningful deficit reduction and could be characterized by critics to be a sham. Although the FY 86 deficit would be reduced by the amount sequestered, releasing those funds in FY 87 would only increase FY 87 outlays and nullify the deficit reduction achieved in FY 86. In contrast to the interpretation urged by the

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[7] The local governments argue that because Revenue Sharing Trust Funds are entitlements the Secretary was required to disburse the entire amount appropriated to the Trust Fund in 1986. This argument begs the question because as we discuss below we believe Gramm-Rudman-Hollings' sequestration provision was intended to effect a reduction in FY 86 appropriations. It is clear that Congress has the power to reduce appropriations through subsequent legislation. Indeed, Congress originally appropriated $4,566,700,000 for FY 86, but subsequently reduced this appropriation to $4,185,000,000. Pub. L. 99-160, 99 Stat. 909, 924 (Nov. 25, 1985).

local governments, our interpretation of this provision will result in meaningful deficit reductions. To illustrate, in FY 86 the sequestration order is put in place. This reduces FY 86 entitlements and the sequestered funds remain in the applicable Trust Fund. When the sequestration order expires the funds remain available as FY 87 budgetary resources, subject to subsequent Congressional direction. Thus a deficit reduction in FY 86 is achieved and the sequestered funds carry forward as FY 87 budgetary resources, thereby reducing the amount which must be appropriated in FY 87 to meet FY 87 obligations.

When divining Congressional intent we must also look to the general area to which the particular legislation was intended to apply. *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). Section 256(a)(2) applies to many Special and Trust Funds previously established by Congress. *See* Plaintiff's Exhibit P (listing Special and Trust Funds governed by § 256(a)(2)). Thus, the State and Local Government Fiscal Assistance Trust Fund is only one of many such Trust Funds which were affected by the Gramm-Rudman-Hollings sequestration order.

We believe the State and Local Government Fiscal Assistance Trust Fund can be characterized as an aberration. It is only because this Trust Fund was terminated by COBRA that we are presented with this question of statutory interpretation.

In fact, counsel for the Secretary noted in her brief and at oral argument that she knew of no other Trust Fund governed by § 256 (a)(2) which was to terminate at the end of FY 86. Although our interpretation of § 256 (a)(2) as applied to this Trust Fund results in the local governments losing $180,000,000, when applied to the remaining Trust Funds governed by the provision,

the sequestered funds are not lost but are merely carried forward as FY 87 budgetary resources. The result in this case may be harsh, but we believe it is consistent with Congressional intent. We are not prepared to allow the impact of the sequestration order on the aberrational State and Local Government Fiscal Assistance Trust Fund force a strained interpretation of the sequestration provision. Indeed as noted by the district court, the Secretary has released sequestered funds to beneficiaries of similar Special and Trust Funds for numerous other programs. The unique circumstance of the State and Local Government Fiscal Assistance Trust Fund is that the fund was terminated by COBRA at the close of FY 86.

Our interpretation of the effect of Gramm-Rudman-Hollings' sequestration provision is also supported by the limited legislative history that is available. Although Congress failed to directly address the effect of sequestration of Special and Trust Funds, in the Conference Report the section dealing with loan money referred by analogy to Gramm-Rudman-Hollings' treatment of such funds:

> This is analogous to the treatment of obligations from special, trust, and trust-revolving funds financed through permanent indefinite budget authority; *the obligations from such funds* (if not exempt or subject to special rule) *would be reduced by the sequestration percentage, and the resulting level of estimated obligations would constitute a de facto obligation ceiling.* Assets of such funds would remain in those funds.

H.R. Conf. Rep. No. 433, 99th Cong., 1st Sess. 95, *reprinted in* 1985 U.S. Code Cong. & Admin. News 1012 (emphasis added). This language leads to the conclusion that although § 256 (a) (2) provides that sequestered funds remain available in the Trust Fund, the sequestration provision operates as an appropriation *reduction* for FY 86.

The district court quoted a letter dated May 12, 1986 from the Office of Management and Budget (OMB) to Senator Malcolm Wallop as support for the construction of Gramm-Rudman-Hollings urged by the local governments. This letter "states that 'amounts sequestered in FY 1986 from non-exempt accounts [special or trust funds] *will become available* for obligation on October 1, 1986, unless some other provision in each account's authorizing statutes or a subsequent act of Congress prevents any subsequent expenditure.'" 669 F. Supp. at 521 (emphasis supplied by district court) (quoting Plaintiff's Exhibit P). The district court also found support for its decision in an opinion issued by the Comptroller General. *Id.* A close examination of these letters, however, leads to the opposite conclusion and bolsters the Secretary's argument. As is discussed below, the critical issue is whether the sequestered funds remained available as FY 86 or FY 87 budgetary resources. This issue was not addressed directly by either OMB or the Comptroller General. A close reading of these letters, however, supports our conclusion that the sequestration was intended to effect a reduction of FY 86 budgetary resources. Further, neither letter was written with specific reference to the Trust Fund at issue in this case which was terminated at the close of FY 86.

We believe that the district court failed to address the crux of the Secretary's argument. The critical issue is not whether the sequestered funds were to remain available beyond the expiration of the sequestration order; this is squarely addressed by the language of the statute. 2 U.S.C. § 906 (a)(2) ("amounts sequestered in special or trust funds, which shall remain in such funds and be available in accordance with and to the extent permitted by law. . . ."). The dispositive issue, not addressed by the statute, is whether the sequestered funds were to remain available as FY 86 budgetary resources or as FY 87 budgetary resources. As already discussed, we believe

that Congress intended these funds remain available as FY 87 budgetary resources and available to the extent permitted by law. Thus, as a precondition to the Secretary's disbursing the funds to the local governments there must be applicable FY 87 legislative authority for the disbursal. COBRA repealed the Revenue Sharing Act and its programs at the completion of the FY 86 entitlement period, thus there is no FY 87 authority for the Secretary to disburse the funds. Faced with this situation the Secretary did the only thing that he could do, and that was to transfer the funds to the General Fund of the Treasury. In fact, COBRA authorizes the Secretary to transfer all funds remaining in the Trust Fund to the General Fund after all entitlements are completely made. COBRA, § 14001(a)(2). The Secretary paid the local governments their entire FY 86 entitlements—4.185 billion minus the 4.3% *reduction* mandated by Gramm-Rudman-Hollings—and the remaining 180 million had to be returned to the General Fund.

The district court noted that the sequestered funds were "no year" monies which may be expended without fiscal year limitation. Thus the district court reasoned that this supports the "conclusion that the sequestered funds would be resuscitated after fiscal year 1986 . . . ." 669 F. Supp. at 521. We agree that monies appropriated to the Trust Fund are available without fiscal year limitation, however because we believe Gramm-Rudman-Hollings resulted in a reduction in the FY 86 appropriation to the Trust Fund the provisions of the Revenue Sharing Act and COBRA, which were relied on by the district court, are inapplicable. The district court stressed the Revenue Sharing Act which provided that "[a]mounts in the Trust Fund—remain available until expended." 31 U.S.C. § 6703 (a)(2). Similarly, the district court noted that COBRA provides:

> '[t]he Secretary of the Treasury shall continue to be the trustee of the Trust Fund, *which shall remain*

> *in existence until all entitlement payments* which are required to be made under the Revenue Sharing Act are made in accordance with the terms of such Act. Any funds remaining in the Trust Fund after all of such entitlement payments are *completely made* shall revert to the General Fund of the Treasury of the United States.'

669 F. Supp. at 522-23 (emphasis supplied by district court) (quoting COBRA, § 14001 (a)(2)). The problem in the district court's reasoning and the position urged by the local governments is that it assumes the existence of appropriated funds. In doing so the district court failed to address the ultimate question in this case, which is whether the sequestered funds remained appropriated and available for expenditure. For the reasons already discussed we answer this question in the negative.

The Secretary acted consistently with the Revenue Sharing Act and COBRA by paying out all funds appropriated for the FY 86 entitlement period. Most of the Funds were paid in FY 86 as the quarterly entitlement payments became due. Moreover, some of the FY 86 appropriations were paid out in FY 87 consistent with the Revenue Sharing Act and COBRA. These payments included the reserve account monies that the Revenue Sharing Act authorized the Secretary to hold back for providing adjustments to entitlements at the close of an entitlement period. 31 U.S.C. § 6702 (d). These reserve account monies were released on February 20, 1987.

Finally, the district court refused to give any deference to the Secretary's interpretation of the applicable statutes, stating, "[d]eference is not due, however, where as here, 'Congress has spoken to the precise question at issue.'" 669 F. Supp. at 523 (quoting *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). We do not agree that Congress has addressed the precise question presented in this appeal. In addition we note that in *Chevron* the Supreme Court

also stated: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron*, 467 U.S. at 844.

Without deciding the extent to which we should defer, if at all, to the Secretary's interpretation, we note that the Secretary's interpretation and our decision find support in opinions issued by the OMB and the Comptroller General.

The OMB Director, James C. Miller III, interpreted Gramm-Rudman-Hollings' sequestration provision in a letter to Congressman Richard Cheney. In that letter Miller stated:

> Under the Balanced Budget and Emergency Deficit Control Act of 1985 amounts sequestered from permanent indefinite appropriations from trust and special funds, . . . are not treated as a permanent cancellation. The . . . payments sequestered in FY 1986 would therefore become available for distribution October 1, 1986, unless some other provision in their authorizing statutes or subsequent act of Congress prevents their expenditure.

Joint Appendix at 104. We believe that this language is consistent with our interpretation of § 256 (a) (2). We agree that sequestration did not result in an automatic cancellation, but rather was merely a reduction in FY 86 resources and the sequestered funds would carry forward as FY 87 budgetary resources to be distributed on October 1, 1986, the beginning of FY 87, subject to FY 87 budget authorizing legislation.

The Comptroller General's opinion provides greater support for our interpretation of Gramm-Rudman-Hollings.

> For trust and special funds appropriated on an annual basis, no expenditures may be made without appropriation action by the Congress. We consider that requirement to apply as well to funds remain-

ing in such accounts due to the sequestration process of Public Law 99-177.

In those cases in which trust and special funds are appropriated under permanent indefinite appropriations, it is our view that the Congress intended, through the use of such appropriations, to permit the annual payment of receipts and benefits without further congressional action. We do not consider Public Law 99-177 to have changed that basic principle, and therefore consider the relevant permanent appropriations language to be sufficient to cover all funds in the special or trust account, even those funds carried over from prior fiscal years due to the sequestration process of Public Law 99-177. *Thus, "release" of sequestered amounts in the subsequent fiscal year is, in our view, authorized by the permanent appropriations authority applicable to the account in the subsequent fiscal year.* Release of sequestered amounts should be made as part of the ordinary expenditures from such funds *in the subsequent year.*

. . .

Unlike OMB, however, we do not view sequestered funds as automatically available as of October 1 of the subsequent year. *The authority to make payments of sequestered funds is the same as the authority generally applicable to funds in the account in the subsequent fiscal year.* As indicated in our earlier letter, most of the permanent appropriations involved require that payments be made at the close of the applicable fiscal year.

Your second question is what effect the release of funds sequestered in trust and special fund accounts at the beginning of the subsequent fiscal year has on the budget deficit for that fiscal year, and how such a release of funds contributes to the deficit-reduction goals of Public Law 99-177. *As indicated above, it is our view that the authority for such a release of funds is not derived from a resurgence of prior year authority (which was reduced under Pub-*

> *lic Law 99-177), but instead from the new or existing authority applicable to the subsequent fiscal year* (either from new annual appropriations or existing permanent indefinite appropriations). Consequently, we consider such amounts to be new budgetary resources subject to sequester in the subsequent fiscal year.

Joint Appendix at 105-06 (emphasis added).

Thus, for the above reasons, we hold that Gramm-Rudman-Hollings' sequestration provision resulted in a reduction of FY 86 budgetary resources and as a result of COBRA's repeal of the Revenue Sharing Act the Secretary had no authority to disburse the sequestered Trust Funds to the local governments.

We deferred ruling on the Motion of Ashland County, Wisconsin, and Shelby County, Kentucky, to be Formally Designated Plaintiffs-Appellees until the conclusion of oral argument. In view of our disposition of the merits no purpose would be served in granting this motion. Accordingly, the motion is denied.

III. Conclusion

To summarize, we believe that the district court possessed subject matter jurisdiction over this case. This case does not involve a Tucker Act claim and the APA's waiver of sovereign immunity for claims seeking relief other than money damages was appropriately invoked by the district court. This case involves a substantial federal question and 28 U.S.C. § 1331 conferred jurisdiction on the district court. Thus we affirm the district court's exercise of jurisdiction.

On the merits, we believe that it was appropriate for the Secretary to transfer funds sequestered in the State and Local Government Fiscal Assistance Trust Fund to the General Fund of the Treasury. Gramm-Rudman-Hollings resulted in a reduction of FY 86 entitlements

and carried these amounts over as FY 87 budgetary resources. Congress repealed the Revenue Sharing Program at the completion of the FY 86 entitlement period, thus the Secretary did not have any FY 87 Congressional authority to disburse the sequestered Trust Funds to the local governments. Accordingly, we reverse the order of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5287 **SEPTEMBER TERM, 1987**
Civil Action No. 87-00414

National Association of Counties, et al.

v. United States Court of Appeals for the District of Columbia

James A. Baker, III, Secretary of the Treasury,
Appellant

FILED
MAR 11, 1988

CONSTANCE L. DUPRE
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, Chief Judge, SENTELLE, Circuit Judge, and GIBSON, *Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in the cause is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ Constance L. Dupre
Clerk

Date: March 11, 1988
Opinion for the Court filed by Senior Circuit Judge Gibson.

*Of the United States Court of Appeals for the Eighth Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5287 **September Term, 1987**
C.A. No. 87-00414

National Association of Counties, et al. -

v.

James A. Baker, III, Secretary
of the Treasury,
Appellant

BEFORE: Wald, Chief Judge, Sentelle, Circuit Judge and
Floyd R. Gibson, Senior Judge, United States
Court of Appeals for the Eighth Circuit

O R D E R

Upon consideration of the petition for rehearing of Appellees National Association of Counties et al. it is

ORDERED, by the Court, that the petitiion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED MAY 26 1988
CONSTANCE L. DUPRE
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF COUNTIES, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 87-0414
JAMES A. BAKER, III, Secretary of the Treasury,	)	FILED
	)	JUL 28 1987
	)	CLERK, U.S. DISTRICT
Defendant.	)	COURT
	)	DISTRICT OF COLUMBIA

MEMORANDUM OPINION

Plaintiffs National Association of Counties, National League of Cities, United States Conference of Mayors, and ten individual cities and counties, seek declaratory and injunctive relief to compel defendant to release to 39,000 local governmental units approximately $180 million appropriated for fiscal year 1986 by Congress under the State and Local Government Fiscal Assistance Act of 1972 ("Revenue Sharing Act") to the State and Local Government Federal Assistance Fund ("Trust Fund") but sequestered under the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman"). The matter comes before the Court on the parties' cross-motions for summary judgment.[1] For the reasons set forth below, plaintiffs' motion is granted.

[1]Defendant has styled its motion alternatively as a motion to dismiss.

I. Factual Background

Under the Revenue Sharing Act, 31 U.S.C. § 6701, Congress provides non-categorical financial assistance to local governmental units, including cities and counties, in the form of annual entitlement grants. Payments under the Act are made through the Trust Fund, of which the Secretary of the Treasury is personally the Trustee. *Id.* § 6703.

In November 1985, Congress appropriated a total of $4,566,700,000 to the Trust Fund for the "entitlement period" beginning October 1, 1985 and ending September 30, 1986 (coinciding with fiscal year 1986), but reduced payments from the Trust Fund by $381,700,000 to $4,185,000,000 through a reduction in the final quarterly payment. Pub. L. 99-160, 99 Stat. 909, 924 (Nov. 25, 1985). *See* 31 U.S.C. § 6703(b)(2).

In December 1985, Congress passed and the President signed into law the Gramm-Rudman legislation, Pub. L. 99-177, 99 Stat. 1037 (Dec. 12, 1985), which required an across-the-board sequestration of fiscal year 1986 funding for each "program, project or activity" by a certain percentage determined by the Comptroller General. *See* §§ 251-252.

On February 1, 1986, the President issued an order pursuant to Gramm-Rudman sequestering, among other budget items, $179,955,000 (or 4.3%) of the Trust Fund monies. In late February, the Office of Revenue Sharing ("ORS") of the Department of Treasury implemented the order and directed that the approximately $180 million of the Trust Fund be sequestered and set aside in a special account. Affidavit of Kent A. Peterson, Deputy Director and Acting Director for the ORS ("Peterson Affidavit"), para. 7 (attaching memorandum of former ORS Director Michael F. Hill).[2]

[2]Plaintiffs do not in this action challenge the legality of the sequestration order, but focus instead on defendant's subsequent handling of those sequestered funds.

On April 7, 1986, about two months after the Gramm-Rudman sequestration order, the President signed the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which terminated and provided for the winding down of the general revenue sharing program with the close of the 1986 entitlement period. Pub. L. 99-272, 100 Stat. 327, § 14001 (1986).

In July 1986, the Supreme Court invalidated the President's February sequestration order, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), but Congress subsequently passed and the President signed legislation which affirmed and ratified the President's earlier action. P.L. 99-366 (July 31, 1986). The $180 million reduction in payments to the local governmental units was effected in the third and fourth quarterly payments for the 1986 entitlement period, issued July 7 and September 30, 1986, respectively. Peterson Affidavit, para. 8.

On January 14, 1987, plaintiff National League of Cities requested the Secretary of the Treasury to release the $180 million sequestered under Gramm-Rudman. Pls. Exh. A. The Secretary, through Deputy Assistant Secretary Robert W. Refuse, Jr., informed the National League of Cities on January 30, 1987, that the Funds would not be released and would instead be returned to the General Fund of the Treasury. Pls. Exh. B. On February 6, 1987, plaintiff National Association of Counties also requested the Secretary to release the funds. Pls. Exh. C. Refuse replied on February 18, 1987, that the sequestered funds had already been returned to the General Fund of the Treasury. Pls. Exh. D. Plaintiffs filed this action for declaratory and injunctive relief the next day. The Court has expedited review of this action in light of the congressional restriction that local governmental units must use, obligate, and appropriate all Trust Fund monies by October 1, 1987. COBRA, § 14001(a)(5).

II. Analysis

The question before the Court is a relatively narrow one of statutory interpretation: was the Secretary of the Treasury acting within his statutory authority in refusing to disburse and instead returning to the General Fund the $180 million in Trust Funds of the 1986 entitlement payments to local governments under the revenue sharing program that was sequestered under Gramm-Rudman? The parties agree that the relevant facts are undisputed and that the case is appropriate for summary judgment. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986).

The problem in statutory interpretation posed by this case results in part from Congress' failure to explicate fully the relationship between certain provisions of the three major federal statutes affecting the current status of the general revenue sharing program: the Revenue Sharing Act, Gramm-Rudman, and COBRA. Plaintiffs urge that the plain language of the statutes and congressional intent clearly lead to the conclusion that the sequestered funds survived the 1986 fiscal year and should now be paid to local governments. Looking at the same statutes, defendant argues to the contrary that the funds "lapsed" at the conclusion of the 1986 entitlement period, and therefore that he had no authority to make any further payments and is obligated to return the funds to the general treasury. There is no dispute, at least, that the plain language of the relevant statutes is the proper starting point for the analysis. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Absent a "clearly expressed legislative intention to the contrary," that language is conclusive. *Id.*

The statutory framework for the question posed begins with Gramm-Rudman, which although it effected the sequestration

for fiscal year 1986, left the Trust Fund undisturbed in the long-term. Gramm-Rudman specifically provides that "[a]ny amount . . . which is sequestered or reduced . . . is permanently cancelled, *with the exception of amounts sequestered in special or trust funds*, which *shall remain in such funds* and *be available* in accordance with and to the extent permitted by law, including the provisions of this Act." Gramm-Rudman, § 256(a)(2). The clear import of this language is that the $180 million of the Trust Fund was sequestered was to remain "available" and be distributed according to the relevant authorizing statute and any subsequent legislation. In short, Gramm-Rudman froze $180 million of the Trust Fund for one fiscal year.

The Court does not agree with defendant that survival of the sequestered funds renders Gramm-Rudman a "nullity." Defendant's Reply Memorandum in Support for Summary Judgment, at 16-19. The purpose of sequestration, as opposed to cancellation (which Congress expressly mandated for other programs) was to reduce the size of the 1986 deficit, *not* the deficit in succeeding fiscal years, which could be addressed in subsequent sequestration orders. The payment of the remainder of the 1986 grants in fiscal year 1987 is not inconsistent with the Gramm-Rudman scheme. The impact of such a delay was well recognized by the executive branch as explained in a letter dated May 12, 1986 from the Office of Management and Budget ("OMB") to Senator Malcolm Wallop, which states that "amounts sequestered in FY 1986 from non-exempt accounts [special or trust funds] *will become available* for obligation on October 1, 1986, unless some other provision in each account's authorizing statutes or a subsequent act of Congress prevents any subsequent expenditure. The impact to the deficit will be to *increase the deficit* to the extent that such sequestered funds from FY 1986 are expended in FY 1987, thereby increasing outlays." Plaintiffs' Exhibit ("Pls. Exh.") P (emphasis added). The Comptroller General

was also of the opinion that trust funds sequestered under Gramm-Rudman would be "carried over" into the next fiscal year. Pls. Exh. R. Further confirmation of this interpretation of Gramm-Rudman is found in the fact that defendant has released funds for a wide range of other programs. Affidavit of Victor J. Miller, Pls. Exh. S, para. 8. Defendant argues that these programs are distinguishable from the Trust Fund because unlike these other programs, the revenue sharing program was "terminated" by COBRA. Defendant's argument is unpersuasive, however, because as discussed below, far from cancelling the Trust Fund monies, COBRA specifically protected the 1986 entitlement funds from premature expiration.

The conclusion that the sequestered funds would be resuscitated after fiscal year 1986 is also strongly supported by the general legislative scheme of the Revenue Sharing Act. Congress gave the Trust Fund monies vigor beyond that given to a typical appropriation. The Act provides that "[a]mounts in the Trust Fund—remain available until expended." 31 U.S.C. § 6703(a)(2). Trust Fund monies are, accordingly, "no year" monies that may be expended without regard to the particular fiscal year. *See National Association of Regional Councils v. Costle*, 564 F.2d 583, 587 n.8 (D.C. Cir. 1977) ("*NARC*") (budget authority made "available until its objectives are attained is 'no-year' authority"); General Accounting Office, *Principles of Federal Appropriation Law*, ch. 4, 6-7 (1st ed. June 1982). The legislative history of the Revenue Sharing Act supports this interpretation of the statute's plain language. S. Rep. No. 92-1050, 92d Cong. 2d Sess. 19-20 (1972); H.R. Rep. 92-1018, 92d Cong., 2d Sess. 32-33 (1972) ("[m]oney appropriated to the trust fund is to be available without fiscal year limitation.") Further evidence of Congress' intent that the Trust Fund monies would not lapse at the end of the fiscal year is the plain language of section 6702 which

states that grant payments under the Act are made "*for* cash entitlement period," not, as defendant suggests, "in" each entitlement period.

Congress clearly entrusted to the Secretary the responsibility to ensure that local governments received their entitlement grants without regard to the technical constraints that might be imposed by fiscal years. For example, the Revenue Sharing Act explicitly allows the Secretary to make payments after the expiration of the fiscal year that coincides with the entitlement period. *See* § 6702(b) (payments may be made up to five days after the end of the quarter); § 6702(c) (payments to adjust grants that have been over- or underpaid may be made without fiscal year limitation); § 6702(d) (establishes reserve fund to withhold a portion of allocations for adjustment payments, which grantees receive only after the end of the entitlement year). Plaintiffs claim that the Secretary has in fact made considerable payments to local governments in fiscal year *1987* in the form of adjustments in grants for prior entitlement years. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, at 14. This interpretation of Congress's intent to ensure grants were made is consistent with the status of the revenue sharing program as an *entitlement* program. Congress gave local governments certain rights under the Revenue Sharing Act to demand their full grant for each entitlement period:

> (a) Each unit of general local government *is entitled* to an amount equal to any amount allocated to the government under this chapter for each entitlement period. . . . The Secretary of the Treasury *shall pay* Local Government Fiscal Assistance Trust Fund under section 6703 of this title.

31 U.S.C. § 6702(a) (emphasis added). Thus, Congress made clear that once local governments meet the necessary criteria

for payment—based on population, tax effort, and per capita income— they are *entitled* to receive funds from the Trust Fund. The statute does not give the Secretary discretion to increase or decrease the entitlement grants except in accordance with the statutorily prescribed formula for determining the amount of payment. *See* 31 U.S.C. § 6707. The entitlement status of the grants, which arises once Congress has appropriated the funds, guarantees the program beneficiaries "a legal right to receive federal . . . funds by virtue of certain congressional enactments and under the terms prescribed therein. Violation of such a statutory right normally creates a justiciable cause of action even without a specific statutory authorization for review." *Oklahoma v. United States Civil Commission*, 330 U.S. 127, 136 (1947). The federal government can only deny payment of the full amount of entitlement grants to beneficiaries if the recipient does not comply with the applicable standards, *see, e.g., Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), or where there has been an intervening change in the law expressly authorizing nonpayment. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 879 (1977); *NARC*, 564 F.2d at 586-90. Defendant argues that COBRA constituted such an intervening change in the law.

Defendant contends that his actions were proper because COBRA terminated the revenue sharing program and deprived him of authority to disburse the sequestered funds beyond fiscal year 1986. A close examination of COBRA, however, leads to the opposite conclusion and bolsters plaintiffs' argument that Congress deliberately sought to protect the Trust Fund from at least some of its recent budget-cutting enthusiasm. COBRA made fiscal year 1986 the last year for which Congress appropriated revenue sharing program funds, Pub. L. 99-160, 99 Stat. 909, 924 (1985), and provided for the wind-

ing up of the program's administration. COBRA also directed, however, that

> [t]he Secretary of the Treasury shall continue to be the trustee of the Trust Fund, ***which shall remain in existence until all entitlement payments*** which are required to be made under the Revenue Sharing Act are made in accordance with the terms of such Act. Any funds remaining in the Trust Fund after all of such entitlement payments are ***completely made*** shall revert to the General Fund of the Treasury of the United States.

COBRA, § 14001(a)(2) (emphasis added). Congress made quite clear that it expected that *all* entitlement payments under the Revenue Sharing Act would be made: "[n]othing in this section shall be construed to prevent the payment of any allocation for the entitlement period ending September 30, 1986." *Id.* § 14001(e)(3). Congress even repeated the admonition when it directed the Secretary of the Treasury to transfer funds to the General Fund of the Treasury only "after *all* of such entitlement payments are *completely* made." *Id.* § 14001(a)(2) (emphasis added).

Given such a clear expression of congressional intent in the Revenue Sharing Act, Gramm-Rudman, and COBRA, it is evident that defendant has improperly refused to disburse the sequestered funds and cannot justify his actions in transferring the funds to the general fund. The Secretary can refuse to expend funds appropriated by Congress only where spending discretion has been expressly conferred by Congress itself—in the provisions establishing a given program, in the relevant spending statutes, or in some other provision of law. *Train v. City of New York*, 420 U.S. 35, 44-48 (1975); *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987);

State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); *Kennedy v. Matthews*, 413 F. Supp. 1240, 1245 (D.D.C. 1976) ("There is no longer any doubt that in the absence of express Congressional authority to withhold funds appropriated for implementation of a legislative program the executive branch must spend all funds.") As discussed above, the legislative scheme and various provisions of the statutes at issue clearly indicate that Congress sought to deny the Secretary such discretion. To the contrary, Congress purposefully insulated the Trust Fund from Executive interference.

Defendant argues its handling of the Trust Fund and interpretation of the statutes is entitled to deference because it has a "reasonable basis in law." *NRLB v. Hearst Publications*, 322 U.S. 111, 131 (1944); *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Deference is not due, however, where as here, "Congress has spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. As the Supreme Court noted, "[i]f the intent if Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* In addition, as plaintiffs argue, it is inappropriate to extend the principles of *Chevron* to the instant case where the question does not involve an agency's *administration* of its statutory authority, but rather is a question of divining an agency's congressional mandate. Congress clearly made defendant's role in administering the funds a restricted one, not only by making the allocation formulaic, but also be designating the Secretary as *trustee* of the funds in question, mandating that his fiduciary responsibility is to the *beneficiaries* of those funds, the local governments. Deference in these circumstances on the issue before the Court, therefore, is inappropriate.

Defendant argues finally that even if his actions were improper, this Court has no authority to order injunctive relied because the budget authority for the trust funds has lapsed. This argument is unavailing. Defendant's characterization of the status of the funds, of course, is inextricably linked with the analysis of the merits above. As explained above, the status make clear that the budget authority for the revenue sharing program did not expire with the end of fiscal year 1986, but rather continued; thus this Court has the power to order the requested injunctive relief. The cases relied on by defendant support this conclusion. In *NARC*, 564 F.2d at 588-89, the Court of Appeals held that "since there is no specific statutory directive that [the budget authority] should remain available beyond one year," the administrator's contract authority for the fiscal years specified terminated. *Id.* at 587. The Court concluded that "unless a court can rely on a statutory authorization, it simply lacks the power to order the obligation of public funds, regardless of how appropriate a remedy that order would be." *Id.* at 590. *International Union, UAW v. Donovan*, 570 F. Supp. 210, 220 (D.D.C. 1983), *vacated on other grounds*, 746 F.2d 855 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 81 (1985) (courts have power to order funds be held available beyond their statutory lapse of equity requires and suit filed before budget authority lapsed). The Court has little difficulty in finding here a "specific statutory directive" of continuing budget authority for the Trust Fund monies. As discussed above, Congress specifically protected these funds beyond the expiration of the fiscal year 1986. *See Commonwealth of Pennsylvania v. Weinberger*, 367 F. Supp. 1378 (D.D.C. 1973) (court retains equitable powers in impoundment case where Congress directed that unexpended funds remained available for obligation and expenditure during succeeding fiscal year); *Louisiana v. Weinberger*, 369 F. Supp. 856, 860-01 (E.D. La. 1973); *cf. NAACP, Lake County*

Chapter v. City of Painesville, No. 86-2822 (N.D. Ohio Apr. 15, 1987) (in discrimination suit under Revenue Sharing Act, relief sought was "prospective" and therefore moot as Secretary no longer had power to provide funds).

III. Conclusion

In conclusion, for the reasons set forth above, plaintiffs are entitled to the relief they seek and this Court has the power to order that relief. Accordingly, plaintiffs' motion for summary judgment is hereby granted. A separate order and judgment accompanies this Memorandum Opinion.

IT IS SO ORDERED.

July 28, 1987

/s/ Joyce Hens Green
Joyce Hens Green
United States District Judge

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[3]In their complaint, plaintiffs request "accrued interest" in addition to the sequestered amounts. Complaint, at 9. It is well established that interest cannot be recovered in a suit against the federal government in the absence of express waiver, by contract or statute, or sovereign immunity from an award of interest. *Library of Congress v. Shaw*, 106 S. Ct. 2957, 2963 (1986); *United States v. Louisiana*, 446 U.S. 253 (1980). Plaintiffs have not demonstrated any contractual or statutory basis for their request for interest, and indeed, failed to respond in their reply to defendant's challenge on this issue. Accordingly, interest shall not be awarded.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF COUNTIES, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 87-0414
JAMES A BAKER, III, Secretary of the Treasury,	)	FILED
	)	JUL 28 1987
	)	CLERK, U.S. DISTRICT
Defendant.	)	COURT
	)	DISTRICT OF COLUMBIA

ORDER AND JUDGMENT

In consideration of plaintiffs' and defendant's cross-motions for summary judgment, and the Memorandum Opinion issued this date, it is accordingly hereby ordered that plaintiffs' motion is hereby granted and defendant's motion is hereby denied; and it is

ORDERED AND ADJUDGED that under the Revenue Sharing Act, 31 U.S.C. § 6701 and the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 100 Stat. 327, § 14001, defendant James A. Baker, III, Secretary of the Treasury, is obligated to disburse to local governmental units under the revenue sharing program in accordance with the other relevant provisions of the Revenue Sharing Act the $179,955,000 sequestered under the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman") for the entitlement period of October 1, 1985 through September 30, 1986 and his failure to do so was in violation of these statutes; it is

FURTHER ADJUDGED that the transfer by James A. Baker, III, Secretary of the Treasury, of the sequestered funds out of the State and Local Government Fiscal Assistance Trust Fund was not authorized by law and was in violation of both the Revenue Sharing Act and COBRA, § 14001(a)(2); it

FURTHER ORDERED that James A. Baker, III, Secretary of the Treasury, shall forthwith transfer $179,955,000 from the General Fund of the Treasury of the United States to the State and Local Government Fiscal Assistance Trust Fund; and it is

FURTHER ORDERED that James A. Baker, III, Secretary of the Treasury, shall on or before August 18, 1987 disburse to each local government entitled to payment under the revenue sharing program the appropriate amounts from the sequestered funds.

Judgment is hereby entered in favor of plaintiffs National Association of Counties, National League of Cities, United States Conference of Mayors, the City of New York, the City of Kansas City, the City of Erie (Pennsylvania), Cuyahoga County (Ohio), San Bernardino County (California), San Diego County (California), Shelby County (Tennessee), and Ventura County (California), and against James A. Baker, III, Secretary of the Treasury.

IT IS SO ORDERED.

July 28, 1987

/s/ Joyce Hens Green

Joyce Hens Green
United States District Judge

APPENDIX E

The relevant provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037 (1985), *codified at* 2 U.S.C. §§ 901 *et seq.*, are as follows:

§ 255, 2 U.S.C. § 905. Exempt programs and activities

(g) Other programs and activities

(1)(A) The following budget accounts and activities shall be exempt from reduction under any order issued under this subchapter:

* * *

Payments to state and local government assistance trust fund . . ..

§ 256, 2 U.S.C. § 906. Exceptions Limitations, and Special Rules.

(a) Effect of Reductions and Sequestrations.

(2) Sequestrations.-Any amount of new budget authority, unobligated balanced, obligated balances, new loan guarantee commitments, new direct loan obligations, spending authority (as defined by section 401(c)(2) of the Congressional Budget Act of 1974), or obligations limitations which is sequestered or reduced pursuant to an order issued under section 252 is permanently cancelled, with the exception of amounts sequestered in special or trust funds, which shall remain in such funds and be available in accordance to and to the extent permitted by law, including the provisions of this Act.

The relevant provisions of the State and Local Fiscal Assistance Act, 31 U.S.C. §§ 6701 *et seq.*, are as follows:

§ 6701. Definitions and Application

(a) In this chapter

(1) "entitlement period" means each one-year period beginning on October 1 of 1982, 1983, 1984, and 1985.

§ 6702. Payments to governments.

(a) Each unit of general local government is entitled to an amount equal to any amount allocated to the government under this chapter for each entitlement period. The Secretary of the Treasury shall pay each amount out of the State and Local Government Fiscal Assistance Trust Fund under section 6703 of this title.

(b) Except as provided under regulations of the Secretary, the Secretary shall determine allocations under this chapter for an entitlement period by the first day of the 3d month before the beginning of the period. The Secretary shall pay each amount under this section in installments. An installment shall be paid at least once a quarter by the 5th day after the end of the quarter. The Secretary initially may estimate the amount of each installment.

(c) The Secretary shall adjust a payment under this chapter to a State government or unit of general local government to the extent that a prior payment to the government was more or less than

the amount required to be paid. However, the Secretary may increase or decrease a payment to the government only when the Secretary or the government demands the increase or decrease within one year after the end of the entitlement period for which the payment was made.

(d) The Secretary may reserve a percentage (of not more than 0.5 percent) of the amount under this section for an entitlement period for a State government and all units of general local government in the State when the Secretary considers the reserve is necessary to ensure the availability of sufficient amounts to pay adjustments after the final allocation of amounts among the units of general local government in the State.

§ 6703. State and Local Government Fiscal Assistance Trust Fund.

(a) The Department of the Treasury has a State and Local Government Fiscal Assistance Trust Fund. The Secretary of the Treasury personally is the trustee of the Trust Fund. Amounts in the Trust Fund

(1) except as provided in this chapter, may be used only for payments to Statement governments and units of general local government under this chapter; and (2) remain available until expended.

The relevant provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 327 (1986) are as follows:

§ 14001. Termination of General Revenue Sharing

(a) In general

(1) Except as otherwise provided in this section, chapter 67 of title 31, United States Code, is hereby repealed.

(2) The Secretary of the Treasury shall continue to be the trustee of the Trust Fund, which shall remain in existence until all entitlement payments which are required to be made under the Revenue Sharing Act are made in accordance with the terms of such Act. Any funds remaining in the Trust Fund after all of such entitlement payments are completely made shall revert to the General Fund of the Treasury of the United States.

* * *

(e) Effective Dates

(1) Except as otherwise provided in this subsection, the repeal and amendments made by this section, and the provisions of this section, shall take effect on the earlier of

(A) the date of the adjournment sine die of the 99th Congress, or

(B) December 31, 1986, unless the provisions of chapter 67 of title 31, United States Code, are amended before the earlier of such dates to apply to any entitlement period beginning after September 30, 1986.

* * * *

* * * *

(3) Nothing in this section shall be construed to prevent the payment of any allocation for the entitlement period ending September 30, 1986.

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JOSEPH E. SPANIOL, JR.
CLERK

No. 88-505

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF COUNTIES, ET AL., PETITIONERS

v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1988

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v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge the ruling of the court of appeals that the Secretary of the Treasury had no authority to disburse to local governments $180 million in Revenue Sharing Trust Funds sequestered by Congress during the final year of the Revenue Sharing Program.

1. The Revenue Sharing Act, 31 U.S.C. 6701 *et seq.* (repealed 1986), established a financial assistance program for local governments authorized through fiscal year (FY) 1986.[1] The payments to the local governments were made

[1] As initially enacted in 1972, the Revenue Sharing Act authorized and appropriated funds for the original five-year duration of the program. Thereafter, the program was reenacted and amended several times to authorize appropriations for several years at a time. See Pub. L. No. 92-512, § 102, 86 Stat. 919; Pub. L. No. 94-488, § 6(e)(1), 90 Stat. 2347; Pub. L. No. 96-604, § 2(c)(1), 94 Stat. 3517; Pub. L. No. 97-258, § 1, 96 Stat. 1012; Pub. L. No. 98-185, §§ 2, 9(a), 97 Stat. 1309, 1311.

through the State and Local Government Fiscal Assistance Trust Fund, of which the Secretary of the Treasury was the trustee (Pet. App. 3a). The Trust Fund was funded entirely by appropriations earmarked for "entitlement period[s]," which coincided with fiscal years (31 U.S.C. 6703(b)). Qualified local governments were awarded a pro rata share of the money appropriated for any given entitlement period (31 U.S.C. 6707-6709). The trustee was authorized to pay out the money appropriated for these entitlement periods beyond the end of the fiscal year (31 U.S.C. 6703(a)(2)).

The last reauthorization of the Revenue Sharing Program expired with the FY 1986 entitlement period. In addition, Congress affirmatively terminated the program in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, § 14001, 100 Stat. 327, and made provisions for an orderly winding down at the close of the FY 1986 entitlement period.

For the FY 1986 entitlement period, Congress originally authorized $4,566,700,000 for the Trust Fund but subsequently reduced that appropriation to $4,185,000,000. Pub. L. No. 99-160, § 1, 99 Stat. 924. In addition, 4.3% of the $4.185 billion was required to be sequestered pursuant to the so-called "Gramm-Rudman-Hollings" Act. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified at 2 U.S.C. (Supp. III) 901 *et seq.*).[2] The $180 million at stake in this case represents the 4.3% sequestered under Gramm-Rudman-Hollings.

Section 256(a)(2) of Gramm-Rudman-Hollings, 2 U.S.C. (Supp. III) 906(a)(2), provides generally that

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[2] After this Court invalidated the President's sequestration order, Congress passed legislation ratifying that order. Pub. L. No. 99-366, 100 Stat. 773.

budget authority required to be sequestered under the act "[is] permanently cancelled." Section 256(a)(2) also provides, however, that amounts sequestered in trust funds "shall remain in such funds and be available in accordance with and to the extent permitted by law." As the court of appeals noted (Pet. App. 16a, 20a), the meaning of that provision is the crux of this case, for it determines whether in fact the $180 million remained appropriated after the trust fund was terminated at the end of the sequestration year.

The Secretary of the Treasury took the position that, because the Revenue Sharing Trust Fund, unlike any other trust fund affected by Gramm-Rudman-Hollings, was terminated with the close of the FY 1986 entitlement period, he had no authority to release the money to the local governments at the end of the sequestration period. Pursuant to Section 14001(a)(2) of COBRA, 100 Stat. 328, he returned the money to the General Fund of the Treasury. Petitioners, several local governments and several organizations of local governments, brought suit seeking an injunction requiring the Secretary to release the funds.

The district court held that the Secretary was required to disburse the funds (Pet. App. 30a-41a). The court reasoned that Section 256(a)(2) of Gramm-Rudman-Hollings had the effect of merely "freezing" the money for one year (Pet. App. 34a). The court found the authority for distributing the money at the end of the sequestration in two provisions: in the Revenue Sharing Act's provision that trust fund monies could generally be paid out after the close of the fiscal year, and in COBRA's provision that all entitlement payments "required to be made" be "completely made" before any remaining monies revert to the Treasury (*id.* at 35a, 38a).

2. The court of appeals unanimously reversed. The court first looked to the plain language of Section 256(a)

(2), agreeing with the district court that the monies sequestered in trust funds were to remain "available," but finding that the "dispositive issue," which the district court failed to address, was whether the funds remained available beyond the expiration of FY 1986 (Pet. App. 15a-17a, 20a-21a). The court interpreted the language that the funds remain " 'available in accordance with and to the extent permitted by law' " as "requiring the funds to remain available in the applicable Trust Fund as FY 87 budgetary resources," which could be spent only if some "independent source of legislation" applicable to FY 1987 authorized its expenditure (*id.* at 16a-17a). The court then concluded that, "[s]ince COBRA repealed the Revenue Sharing Act and its programs, the Secretary has no FY 87 authority to disburse the sequestered funds" (*id.* at 17a).

The court of appeals found its reading of Section 256(a)(2) consistent with the limited available legislative history and with interpretations of Section 256(a)(2) rendered by both the Comptroller General and the Office of Management and Budget (Pet. App. 19a-20a, 23a-25a). The court also found its reading the "only plausible interpretation" in view of Gramm-Rudman-Hollings' goal of reducing the deficit (*id.* at 17a-18a) and noted that, for trust funds other than the terminated Revenue Sharing Trust Fund, the sequestered funds would not be lost, but would be carried forward as FY 1987 budgetary resources (*id.* at 18a-19a).

Finally, the court of appeals found inapplicable all of the provisions of the Revenue Sharing Act or COBRA relied on by petitioners and the district court, because those provisions merely mandated the release of monies that in fact remained appropriated for the Trust Fund (Pet. App. 21a-22a). The court held that the Secretary fully executed his duties as trustee by releasing to the local governments "their entire FY 86 entitlements—4.185 billion minus the

4.3% *reduction* mandated by Gramm-Rudman-Hollings" and that he did "the only thing that he could do," which was to return the $180 million to the General Fund of the Treasury, as authorized by COBRA (*id.* at 21a).

3. The decision of the court of appeals is correct, has little if any prospective significance, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

Petitioners urge on this Court an inapplicable legal standard and are thus simply wrong in asserting that the decision below conflicts with prior rulings of this Court. The issue in *Train* v. *City of New York*, 420 U.S. 35 (1975), and *State Highway Comm'n* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973), the so-called "impoundment" cases on which petitioners chiefly rely, was whether Congress had intended to give the Executive Branch discretion to spend less than the entire amount Congress had appropriated for a program.[3] In the present case, the issue is whether Congress in fact appropriated the funds; the Secretary has never sought to assert any discretionary authority with regard to the funds. Indeed, the Secretary's consistent position has been that he had no choice but to return the $180 million to the General Treasury, because the provisions in the three statutes involved in this case effected a congressional cancellation of any appropriations

[3] Similarly, the issue in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), was whether Congress intended to confer discretion on the Executive not to follow the decision of an arbitrator to whom Congress had delegated the spending decison. The decision in *City of New Haven* v. *United States*, 809 F.2d 900 (D.C. Cir. 1987), is concerned solely with Congress's intent in passing the Impoundment Control Act of 1974, 2 U.S.C. 683, 684, and is thus of no aid in this case except as a reminder that, if this case really involved an issue of discretionary spending, petitioners certainly would have argued that the Impoundment Control Act was violated.

authorizing disbursement of the funds; the money was withdrawn by operation of law.

Because the true issue in this case was whether Congress intended the $180 million to remain appropriated, and not whether the Secretary had discretion with regard to unquestionably appropriated funds, this case presented to the court of appeals an ordinary statutory construction problem. The court answered that problem by correctly turning to traditional statutory construction principles and correctly rejected petitioners' proffered legal standard.[4] See *United States* v. *Will*, 449 U.S. 200, 221-224 (1980) (in determining whether Congress had in fact repealed previously enacted salary increases, the Court looked to language of the statute and its legislative history to discern intent); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 47 (D.C. Cir. 1977) (in determining whether Congress had in fact decreased its original appropriation, the court looked to the plain meaning of the statute, the legislative history, and the "absurdity" of a contrary construction).[5]

Petitioners suggest (Pet. 12) that the court of appeals inappropriately deferred to the agency interpretation of the statutes at issue under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the court of appeals explicitly de-

[4] In any event, we do not believe that *Train* and *Volpe* establish the principle petitioners assert regarding the need for an "express" congressional command before an intent to grant discretion to the Executive will be found. Indeed, *Volpe* held that Congress had not "expressly or impliedly" given discretion to the Executive to withhold funds (479 F.2d at 1118).

[5] In language equally applicable to this case, the *City of Los Angeles* court noted (556 F.2d at 49 & n.21, citing *Train*, *Volpe*, and other "impoundment" cases) that the case before it did "not involve independent refusal by the Executive or agency to spend the amounts that Congress has required. * * * This was not executive 'impoundment' of the legislative appropriations; it was a congressional reduction – if an impoundment at all, an impoundment by statute."

clined to decide "the extent to which we should defer, if at all, to the Secretary's interpretation" (Pet. App. 23a). In any case, there would have been nothing inappropriate about applying *Chevron* deference to this funding dispute.[6]

Petitioners' citation (Pet. 10) of "repeal by implication" cases is similarly inapposite. Two of the cases[7] addressed the asserted repeal of a substantive measure by way of an appropriations act, an especially disfavored statutory construction, whereas this case involves the reduction of a previous appropriation by a later appropriations measure. A third case, *United States* v. *Will, supra,* which involved a reduction in previously enacted salary increases, actually supports the court of appeals here: "[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' * * * 'The whole question depends on the intention of Congress as expressed in the statutes.' " 449 U.S. at 222 (citations

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[6] In the portion of its opinion that noted the consistency of the court's result with administrative interpretations of the statutes at issue (Pet. App. 23a-25a), the court of appeals did not look to the Secretary's interpretation but to those of the Office of Management and Budget and the Comptroller General. The latter is an official of the Legislative Branch, not the Executive (see *Bowsher* v. *Synar,* 478 U.S. 714, 727-732 (1986)), and his interpretation agrees with that of the relevant Executive Branch officials. Petitioners' misconceived assertions that this case involves "a conflict between Congress and the Executive Branch" (Pet. 12) and that "the court of appeals gave weight to the *Secretary's* interpretation" (*ibid.* (emphasis added)) thus serve only to obscure the real issues in this case.

[7] *TVA* v. *Hill,* 437 U.S. 153 (1978) (snail darter's designation as an endangered species not impliedly repealed by appropriations for completion of dam); *Demby* v. *Schweiker,* 671 F.2d 507 (D.C. Cir. 1981) (substantive formula for distribution of funds not impliedly repealed by appropriations measure reducing total amount available).

omitted).[8] The "repeal by implication" doctrine—which involves gleaning whether Congress implicitly intended by way of a later, assertedly inconsistent statute to affect an earlier measure—has no real application to this case, in which the court interpreted statutory language explicitly intended to affect an earlier measure in order to discern the *manner* in which the earlier measure was affected.

Finally, petitioners gain nothing by their citation (Pet. 10-11) of *United States* v. *Larionoff,* 431 U.S. 864 (1977), for the proposition that constitutional problems would be presented by congressional reduction of an "entitlement" benefit. Here, petitioners have not presented a constitutional challenge, and, by not challenging Congress's initial reduction in the FY 1986 appropriation from $4.566 billion to $4.185 billion (after the beginning of FY 1986), they have in essence conceded that no "entitlement" to Revenue Sharing Trust Funds attaches except as to the pro rata share of monies actually appropriated. See 31 U.S.C. 6702(a), 6703(b), 6707-6709. As the court of appeals noted (Pet. App. 17a n.7), petitioners' "entitlement" argument "begs the question," because the issue in this case concerns how much money in fact remained appropriated and available for payment of the "entitlements." [9]

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[8] The fourth case, *United States* v. *Borden Co.,* 308 U.S. 188 (1939), does not deal with appropriations at all, but rather with the extent to which subsequent substantive law will be read to repeal by implication earlier substantive law.

[9] Petitioners fault the court of appeals for not addressing what they label the "savings provision" (Pet. 8) of Gramm-Rudman-Hollings, *i.e.,* Section 255(g)(1), 2 U.S.C. (Supp. III) 905(g)(1), which exempted from sequestration (along with other accounts) the "Payments to state and local government assistance trust fund (20-2111-0-1-851)." Petitioners elsewhere (Pet. 4, 11, 13) cite the provision as evidence that Congress accorded special treatment to the Revenue Sharing Trust Fund, leaving the impression that possibly the Trust Fund was to have

The decision of the court of appeals also announced no generally applicable legal principles and has little if any prospective importance. The Revenue Sharing Program has been terminated, and the court's statutory construction of Gramm-Rudman-Hollings would be relevant in a future case only if (1) sequestration is again required for trust funds, and (2) the sequestration applies to a particular trust fund that has been terminated independently of the sequestration law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

---

been exempt from sequestration altogether. But petitioners conceded below that the Trust Fund was subject to sequestration (Pet. App. 15a n.6, 31a n.2) and they are attempting now to confuse the issue. As explained to Congress by Treasury officials, Section 255(g)(1)'s provision was necessary because of a peculiar accounting device. *Hearings on H.R. 5313 Before a Subcomm. of the Senate Comm. on Appropriations*, 99th Cong., 2d Sess. 481-482 (1986). Since the Fund has no source of revenue other than appropriations, there were two line accounts for administering the Trust Fund: the "payments to" the Revenue Sharing Trust Fund and the Trust Fund itself. If Congress had not exempted the first from sequestration, there would have been a double sequestration (*ibid.*).

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NATIONAL ASSOCIATION OF COUNTIES, *et al.*,
Petitioners,

v.

NICHOLAS F. BRADY, Secretary of the Treasury,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners submit this reply brief to respond to four points made by respondent in his memorandum in opposition ("Mem. Opp.").

1. Respondent's opposition depends in large measure on an inaccurate formulation of the question presented. According to respondent, the "issue is whether Congress in fact appropriated the funds." Mem. Opp. at 5. That is not, however, the question presented by this petition. There can be no doubt that Congress appropriated $4,185,000,000 for the Trust Fund for the 1986 entitlement period, and that the local government beneficiaries in fact received all but $180 million of the amount appropriated. *See* Pub. L. 99-160, § 1, 99 Stat. 924 (1985). Thus, the question actually presented is whether Congress ever acted affirmatively to rescind the remaining $180 million that it had appropriated for 1986. Framed in this light, it is clear that the cases relied on by petitioners — especially *United States v. Larionoff*, 431 U.S. 864 (1977) and *United States v. Will*, 449 U.S. 200 (1980) — require that, in order to repeal

an existing appropriation, Congress must do so clearly, which it did not do here.

2. In attempting to identify the statutory basis for the Secretary's withdrawal of the $180 million, respondent does no more than point to what the court of appeals described as the "4.3% *reduction* mandated by Gramm-Rudman-Hollings." Mem. Opp. at 5 *citing* Pet. App. 21a. This argument, however, ignores the plain fact — never addressed by respondent — that the key provisions of Gramm-Rudman-Hollings, and the only provisions cited by the court of appeals, affirmatively *preserved* these funds. Thus, both section 255(g)(1), which protected appropriations into the Trust Fund from sequestration, and section 256(a)(2), which protected monies sequestered in the Trust Fund from cancellation, were clearly aimed at ensuring that Trust Fund monies were wholly insulated from reduction by Gramm-Rudman-Hollings. By approving the repeal of $180 million in Trust Fund monies, without any indication at all from Congress that it intended that result, the court of appeals flatly disregarded this Court's prior decisions in cases like *Larionoff* and *Will*, and therefore this Court's review is required to restore order in this vital area of law.

3. Respondent misstates petitioners' argument in suggesting that petitioners, by "not challenging Congress's initial reduction in the FY appropriation . . . have in essence conceded that no 'entitlement' to Revenue Sharing Funds attaches except as to the pro rata share of the monies actually appropriated." Mem. Opp. at 8. Petitioners have all along contended that their entitlement vested when, and only when, Congress actually appropriated monies to the Trust Fund. At that point, but not before, petitioners had an enforceable entitlement to those funds. As this Court emphasized in *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1946) — a case respondent fails to cite, let alone address — the government may deny full payment to an entitlement

beneficiary *only* if there has been an intervening change in the law that expressly authorizes nonpayment. *See also United States v. Larionoff*, 431 U.S. at 879. Here, respondent has never even attempted to meet that burden.

4. Finally, respondent argues that review is not appropriate because this case "has little if any prospective importance." Mem. Opp. at 9. But what respondent overlooks, and what lies at the heart of this case, is whether the courts may countenance the rescission of entitlement funds, or the repeal of the statute which mandates their expenditure, absent an express command from Congress. If the ruling below stands uncorrected, it will erode what had once been the fundamental characteristic of a federal entitlement — the guarantee of full payment. Thus the ruling below threatens the integrity of entitlement programs for all beneficiaries, not just local governments, and not just under the Revenue Sharing program.

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